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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 511

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

THE CITIZENS NATIONAL BANK IN ABILENE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

To the Honorable the Supreme Court of the United States:

The Supreme Court of Texas, by majority action of two judges (R. 127-134), has arbitrarily refused to enforce a plain and unambiguous contract sanctioned by statute and admittedly not in violation of any law or repugnant to public policy; it has arbitrarily changed the terms of the contract made by the parties and substituted in lieu thereof new contractual provisions under which one party is required to perform and the other is excused therefrom; and it has arbitrarily ignored the plain language of the statutes of Texas authorizing or permitting the contract in question

while invoking those statutes to support its decision; all "in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' ", *American Railway Exp. Co.*, v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

Summary and Short Statement of the Matter Involved.

Respondent, The Citizens National Bank in Abilene, as assignee of R. H. Locke, brought suit against petitioner, The Texas and Pacific Railway Company, to recover the balance due Locke under and subject to a construction contract with the Railway Company (R. 1-6). Petitioners Frank Parrott, Fort Worth Sand & Gravel Company, and M. M. Dawson and K. A. Browning, a partnership doing business as F. C. Crane Company, intervened and sought payment in full of their claims for materials and supplies (R. 6-10, 13-16, 10-13).

Under the contract in question, which was dated August 25, 1936, R. H. Locke agreed to perform all grading and incidental culvert work in connection with the reduction of curves at certain locations on the main line of the railway (R. 30-34). The contract specified the rates or prices to be paid, provided that the Railway's Engineer, promptly after the first of each month, should estimate the work done and determine the amount due Locke, and that the Railway Company thereupon should pay Locke the amount of such estimate, less previous payments and less fifteen per cent (R. 31-32). And paragraph 6 of the contract provided that:

> "Upon completion of the work herein provided, the Chief Engineer shall have an inspection made and if the work is complete and satisfactory, a final statement of all work done and moneys due the Contractor shall be made by the Railway Engineer, whereupon, *after the Contractor has furnished written evidence satisfactory*

to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work to be done hereunder, the Railway shall pay to the Contractor the full amount earned under this contract, less payments previously made, as soon as final statement can be audited and passed for voucher in the course of the Railway's business" (our italics) (R. 32).

On the same date, August 25, 1936, Locke executed in favor of the Bank an assignment, approved by the Railway Company (R. 35), reading in part as follows:

> "* * * the said R. H. Locke does hereby assign and transfer to the said Citizens National Bank, in Abilene, Texas, all sums of money now due or to become due from The Texas and Pacific Railway Company under the above-described contract, and the said R. H. Locke does hereby authorize and direct the said Citizens National Bank to collect and receive all said sums of money, and does hereby authorize and direct the said The Texas and Pacific Railway Company to make payment of all said sums of money to the said Citizens National Bank in Abilene, Texas, as said payments may become due under said contract" (R. 35).

Paragraph 6 was in the contract from its inception and the Bank knew of it or was charged with knowledge of it before and at the time it accepted the assignment. It appears from a stipulation of record (R. 30) that the Bank knew on or about August 15, 1936, ten days before its assignment from Locke, that he had been awarded the contract by the Railway Company, and the very contract before this Court was in the Bank's possession on August 25, 1936, the date it accepted the assignment (R. 36). It is not contended by the majority opinion that the Bank acquired any greater rights than Locke had.

After completion of the work, the Railway owed Locke a balance of $2,259.11 (R. 44), subject to the provisions of paragraph 6 of the contract. The Bank, as assignee of Locke, demanded this entire amount (R. 42-43) which the Railway Company refused to pay because it had notice of outstanding claims against Locke for material and supplies (R. 39-40, 41, 61-62) and because the Railway Company had not been furnished with written evidence satisfactory to it that Locke had paid in full all amounts due by him to any and all persons who performed labor or furnished materials or supplies in connection with the work done by him under the contract (R. 62). Locke, a witness for the Bank, testified on cross-examination, and it was stipulated, that Locke owes Frank Parrott a balance of $555.11 (R. 46), Fort Worth Sand & Gravel Company a balance of $175.32 (R. 49, 56), and F. C. Crane Company a balance of $137.77 (R. 48), for rental on dragline, contractor supplies, two cars of gravel, and one car of sand used by Locke in the construction work (R. 45, 46-58).

The District Court rendered judgment for the Bank (R. 28-29) and the Railway Company and the interveners appealed (R. 29). The Court of Civil Appeals for the Eleventh District of Texas reversed the judgment of the trial court, holding (1) that the contract was for the benefit of interveners and they could maintain a suit thereon, and (2) that the Railway Company had the right to withhold payment to the Bank, as assignee of Locke, until there had been compliance with the condition precedent, namely, the furnishing of written evidence, satisfactory to the Railway Company, that all laborers and materialmen had been paid (R. 68-74). On the last point, the Court of Civil Appeals said:

> "In the instant case the contract is unambiguous" (R. 69).

* * * * * * *

"The contract means the same as if it had expressly provided that the last $2,259.11 of the total amount earned under the contract should not be paid until the Contractor had paid for all labor, materials and supplies, and had furnished satisfactory written evidence of such payments" (R. 70).

* * * * * * *

"* * * we see no escape from the conclusion that the Railway Company, having refused to pay the money to the bank, was under no duty to do so, unless and until the condition subject to which the Railway Company promised to make payment was complied with.

"No basis exists for any serious contention that the Railway Company waived the condition. Consent by the Railway Company to the assignment by the Contractor of the moneys to become due under the terms of the contract neither added to, nor detracted from, the obligations and rights of the parties under the contract. The Railway Company had no right to object to the assignment of the contract, in the sense that it was assigned. It attempted to reserve in the contract no such right to object. It would be most unreasonable to hold that by consenting to the assignment, which required no consent, there was an implied novation of the terms of the contract itself.

"There being no waiver of the condition upon which payment was promised, we see no reason why the elementary rule should not apply that a conditional promise may not be enforced by the promisee without compliance with the conditions. Concrete application of this rule under similar facts are to be found in Bridgeport Mac. Co. *vs.* First Nat. Bank, 44 S. W. (2d) 414; and American Emp. Ins. Co. *vs.* Roddy (Com.), 51 S. W. (2d) 280" (R. 73).

The Bank filed an application for writ of error to the Supreme Court of Texas (R. 74-102) and despite opposition by the Railway Company and the interveners (R. 102-119, 120-127), the application was granted. The Supreme Court

reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the District Court (R. 142). We quote from the accompanying opinion:

> "We deem it important to here quote in full subdivisions 5 and 6 of the contract between Locke and the Railway. They are as follows:
>
> 'As soon as possible after the first day of each month, the Engineer shall estimate the quantities of work completed under this contract, and by applying unit prices shall determine the total work performed and the amount due the Contractor. The Railway shall as soon thereafter as such estimate can be audited and passed for voucher in the course of the Railway's business, pay the Contractor the amount of such estimate less previous payments and less fifteen (15) per cent.
>
> 'Upon completion of the work herein provided, the Chief Engineer shall have an inspection made and if the work is complete and satisfactory, a final statement of all the work done and moneys due the Contractor shall be made by the Railway Engineer, whereupon, *after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work to be done hereunder, the Railway shall pay to the Contractor the full amount earned under this contract, less payments previously made,* as soon as final statement can be audited and passed for voucher in the course of the Railway's business' " (our italics) (R. 128).
>
> * * * * * * *
>
> "In due time Locke complied with his contract with the Railway, and the same was accepted by it. In the meantime Frank Parrott, Fort Worth Sand & Gravel Company, and F. C. Crane Company had furnished Locke with materials and machinery used in and on this project, for which Locke has never paid. It ap-

pears that the amounts respectively of such claims are: to Frank Parrott, $555.11; to Fort Worth Sand & Gravel Company, $175.32; and to F. C. Crane Company, $137.77. It also appears that on February 16, 1937, Locke owed the Bank $2,173.30, which sum, with accrued interest, is the amount of Locke's indebtedness to the Bank. It conclusively appears that none of the parties above mentioned, who furnished Locke with materials and machinery, have ever fixed, or attempted to fix, any lien against the Railway, and that when this suit was filed and tried in the district court, the time had long since passed when, under applicable statutes, any lien could be fixed against the Railway for any matter arising out of this contract'' (R. 129).

* * * * * * *

''To our minds, when this contract is viewed as a whole and in the light of the above-stated rules, and when the provision providing for final payment 'after the contractor has furnished written evidence that he has paid in full' certain named classes of persons, if read in the light of the entire contract, and in the light of our applicable lien statutes, it becomes plain that the provision of paragraph 6 of the contract, just referred to, was not intended as an absolute condition to be enforced regardless of any necessity or reason therefor; or as a contractual provision made for the benefit of third persons. To the contrary, it is evident that the provision was embraced in the contract only to protect the Railway against those who might claim liens against it under our lien statutes pertaining to railroads'' (R. 132).

By such construction, the majority opinion has changed a plain and unambiguous contract requiring that ''*all* persons'' shall be paid, into one which requires only that persons filing liens shall be paid. The contract is just as surely changed and restricted in its operation and effect as if the court had written bodily into the contract the italicized lan-

guage appearing at the end of the following quotation from paragraph 6:

> "* * * after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor" *and who have filed liens against the Railway.*

And the Court justifies itself in thus refusing to enforce the contract which the parties made, and in making a new contract for them, upon the assumption that the enforcement of the contract as written by the parties "will be of no benefit to the Railway" (R. 132) and upon the further assumption that the provision in paragraph 6 "was embraced in the contract only to protect the Railway against those who might claim liens against it under our lien statutes pertaining to railroads" (R. 132). This, notwithstanding *Article 5468* of these "applicable lien statutes", called to the Court's attention (R. 112), expressly declares that "Nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price" (Vernon's Revised Civil Statutes of Texas, 1925).

The dissenting opinion of Associate Justice Sharp discloses the arbitrary action of the majority members. We quote therefrom:

> "If there is any ambiguity whatever in the language employed by the parties, I have been unable to detect it; and the majority opinion does not point out wherein it lies. Could language be plainer, simpler, and more easy of understanding than the language of paragraph 6 above quoted? The majority opinion, to my mind assumes the issues which we must decide" (R. 137).

* * * * * * *

"But, conceding for the purpose of this opinion, that the contract was made for the benefit of the railway company alone, I ask what benefit? The majority opinion assumes the answer to that question in this language: '* * * it is evident that the provision was embraced in the contract only to protect the railway against liens which might attach to the fund retained by virtue of our applicable lien statutes.' What right have we to make that assumption? The majority opinion does not point out the 'applicable lien statutes.' Presumably the reference was intended to be Article 5452 et seq., R. C. S. 1925. To my mind one insuperable barrier to the conclusion of the majority is the very material difference between the language of Article 5452 and that employed in paragraph 6 above. The parties to this contract provided for retaining a part of the amount to be paid until evidence was furnished that payment had been made 'to any and all persons who may have performed labor or furnished materials or supplies to the contractor in connection with the work.' The statute clearly gives no lien for supplies, and to assume that the parties intended to protect from a lien when no lien was possible would hardly be warranted.

"But, be that as it may, and disregarding this apparent barrier, while still assuming that the provision was made for the benefit of the railway company alone, we return to the question, what benefit? Has a court the right to tell parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others? There are many ways in which the railway company might have been benefited financially by having this retained fund applied to persons who had performed labor and furnished materials and supplies used in connection with this work. Suppose the owner, instead of being a railway company, were an individual, and that the contract related to the erection of some business house in which it was contemplated that the public would go to transact business. It is easy to per-

ceive that such owner might be greatly benefited from a commercial standpoint by the enforcement of such provision. Good will is an asset the same as physical property. Persons and firms who might otherwise become customers might well fail to do so on account of the unpleasant memories that their labor or material which entered into the building had not been paid for. Such owner might be of the opinion that he might experience some difficulty in appeasing his prospective customers by answering to them that they had waited too long to file liens, and for that reason might desire to insert the provisions of paragraph 6 in his contract. To my mind, it is a natural and altogether commendable desire on the part of an individual to make provision that persons who furnish labor and materials to erect an improvement for him should be paid therefor; and this quite irrespective of any financial gain that might flow therefrom.

"For equal reasons, a railway company would be benefited by the enforcement of the provision in question in ways other than the possible avoidance of liens. The good will of the public means much to a railway company. It is a distinct asset of its business. A railway company might well conclude that its competitors would profit by its failure to protect laborers and materialmen. Besides, if such company desires to do that, why should courts prevent it?

"No legislative authorization to insert paragraph 6 in the contract is required, but it is interesting to note that the Legislature recognized that parties might desire to afford greater protection to laborers and materialmen than that afforded by Article 5468, and accordingly provided in said Article that: '* * * Nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price.' But after all, we get back to the simple, fundamental principle with which we started. It is not for the courts to make contracts between parties, and tell them what they meant by the use of clear

unambiguous language. Regardless of why the parties put this provision in the contract, the fact remains that it is there and that it violates no law or public policy; and it is my view that our limited duty is to enforce it as it is written" (R. 137-139).

* * * * * * *

"I think the reasons advanced in the majority opinion are unsound, and same will annul contracts authorized by law and which should be upheld" (R. 139).

* * * * * * *

"It is unquestioned that the parties had the right to make the foregoing contract. This being so, they had the right to require its fulfillment. It is not the policy of the law to bestow a right without furnishing a remedy for its enforcement. The railway company and the contractor, in plain and specific language, agreed that 'after the contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work done hereunder,' in that event the railway company shall pay to the contractor the full amount earned under this contract, etc. It is also unquestioned that this plain agreement was not complied with by the contractor or his assignee. The railway company admits that it holds the money, and it is willing to pay same when the contract has been complied with. The dispute as to who is entitled to the money involved in said contract is now pending in the courts for settlement. All parties claiming an interest in such fund are before the court. Courts are established to give to the parties all the relief to which they may be entitled, either in law or in equity. Certainly the railway company has the right to exact that the contract be complied with before it is compelled to pay the money. If the contractor or his assignee refuses or fails to comply with the plain terms of the contract, certainly the railway company should be per-

mitted to have its rights, as well as the rights of all parties interested therein, settled in the courts, and in such settlement obtain the relief provided by the contract, even if the money retained is applied to obtain such relief.

"Courts are not powerless to do justice in a situation like that here presented. To my mind, there can be but one disposition of this cause which will be in consonance with sound legal principles, and that is to apply this retained fund first to the payment of the claims of intervenors, and then, if any remains, to the claim of the bank" (R. 140-141).

Under the statutes of Texas, a motion for rehearing was duly filed by the Railway Company (R. 143-152), and adopted by the interveners (R. 152-153). An answer to the motions was filed by the Bank (R. 153-163), and the motions having been submitted to the court, were overruled "after due consideration of same" (R. 163).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under paragraph (b) of Section 344, Title 28, United States Code (Judicial Code, section 237, as amended) declaring:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution * * * of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *"

In the interest of brevity, we adopt by reference, as part of our jurisdictional statement, the foregoing summary and statement of the matters involved. It will be observed therefrom that the jurisdiction of this Court is predicated upon the following grounds:

The Supreme Court of Texas, by a majority opinion, has arbitrarily refused to enforce a plain and unambiguous contract sanctioned by the statutes of Texas and not violative of its laws or public policy; and that court by unwarranted construction has arbitrarily changed the terms and limited the scope and operation of such contract. In an effort to sustain its construction, the Supreme Court of Texas has imported into the case the so-called lien statutes of Texas, arbitrarily disregarding a provision in Article 5468 thereof that "nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price" (Vernon's Revised Civil Statutes of Texas, 1925), thereby implying and in effect holding that there is something in said lien laws which deters or prevents parties from agreeing, as they did in this case, that the contractor shall pay *all* persons furnishing labor, material and supplies, whether liens are filed or not. And that court in this case has arbitrarily required the Railway Company to discharge its obligation under the contract by paying for the services performed by Locke while refusing to compel Locke, or his assignee, to discharge his obligation under the contract by furnishing the Railway, in advance of payment, with written evidence satisfactory to it, that "*all* persons" furnishing labor, materials and supplies have been paid in full. In so holding and adjudging, the Supreme Court of Texas has deprived the Railway Company of its liberty and property without due process of law and has denied it the equal protection of the law, contrary to

and in violation of Section 1 of the 14th Amendment to the Constitution of the United States; and that court has construed and applied the lien statutes of Texas in such way as to cause them to impair the obligation of the contract in question, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

The aforesaid actions of the Supreme Court of Texas bring this case squarely within the rule that the Supreme Court of the United States will review the decision of a State supreme court when its "judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'," *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

As stated in the dissenting opinion of Associate Justice Sharp (R. 139), no legislative authority is required for making contracts like the one under consideration, but the Legislature of Texas, recognizing that parties might desire by contract to afford greater protection to laborers and materialmen than that afforded in the lien statutes, expressly declared that "nothing in this (lien) law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price" (Article 5468, Vernon's Revised Civil Statutes of Texas, 1925). Accordingly, the parties contracted that Locke, the original contractor, should receive the balance due from the Railway Company after he furnished it with satisfactory written evidence that he had paid "*all* persons" performing labor, materials or supplies (R. 32). The contract is plain and unambiguous. The Court of Civil Appeals so found (R. 69), and the dissenting Supreme Court Justice said:

"If there is any ambiguity whatever in the language employed by the parties, I have been unable to detect it; and the majority opinion does not point out wherein it lies. Could language be plainer, simpler, and more easy of understanding than the language of paragraph 6 above quoted?" (R. 137).

Such being the case, there was no occasion for the application of arbitrary rules of construction which warped the contract made by the parties, limited its scope and operation, and in fact substituted a contractual provision which they never intended. As written by the parties, the contractor was required to pay "all persons". As changed by the Court, he only has to pay those who fix liens against the Railway Company. It is small wonder that Judge Sharp said in his dissent:

"* * * conceding for the purpose of this opinion, that the contract was made for the benefit of the railway company alone, I ask what benefit? The majority opinion assumes the answer to that question in this language: '* * * it is evident that the provision was embraced in the contract only to protect the railway against liens which might attach to the fund retained by virtue of our applicable lien statutes.' What right have we to make this assumption? * * * Has a court the right to tell parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others?" (R. 137-138).

* * * * * * *

"It is not for the courts to make contracts between parties, and tell them what they meant by the use of clear and unambiguous language. Regardless of why the parties put this provision in the contract, the fact remains that it is there and that it violates no law or public policy; and it is my view that our limited duty is to enforce it as it is written" (R. 139).

* * * * * * *

> "I think the reasons advanced in support of the holding in the majority opinion are unsound, and same will annul contracts authorized by law which should be upheld" (R. 139).

In exercising the above mentioned powers, it is evident that the Supreme Court of Texas has acted arbitrarily and in a manner clearly in "conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' ", *American Railway Exp. Co.* v. *Kentucky*, *supra*. As stated by Associate Justice Sharp in his dissenting opinion, the contract "violates no law or public policy" (R. 139); "it is unquestioned that the parties had the right to make the * * * contract" and "this being so they had the right to require its fulfillment. It is not the policy of the law to bestow a right without furnishing a remedy for its enforcement" (R. 140). By arbitrarily refusing to enforce the plain and unambiguous contract which the parties made, the court below clearly has deprived the Railway Company of its liberty of contract and has deprived it of a vested property right in that contract, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States. By arbitrarily changing the terms of the contract and writing new provisions requiring performance by the Railway Company and excusing performance by Locke or the Bank, the Supreme Court of Texas has deprived the Railway Company of the equal protection of the law, contrary to and in violation of Section 1 of the 14th Amendment to the Federal Constitution. By arbitrarily refusing to give effect to *Article 5468*, Vernon's Revised Civil Statutes of Texas, 1925, which authorized or permitted the making of this contract, the court below has deprived the Railway Company of its liberty and property, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United

States. And in invoking the lien statutes of Texas in aid of its refusal to enforce this contract, the Supreme Court of Texas has so construed or given effect to such statutes as to cause them to impair the obligation of the contract, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Federal Constitution.

The foregoing statements demonstrate the substantial character of the questions presented. If the action of the Supreme Court of Texas in this case is not restrained by the Federal Constitution, then there is no limit to the power of the judiciary to break down legitimate and unambiguous contracts and to interpose and enforce in lieu thereof new contracts which individual judges might have written had they been the contracting parties. It does not require much imagination to visualize the chaotic result upon the business world.

This case was won by the Railway Company and the interveners in the Court of Civil Appeals for the Eleventh Judicial District of Texas (R. 68-74), the first appellate court to act thereon and the first court to write an opinion disclosing the basis for its action. The contract being plain and unambiguous, as found by that court (R. 69), the Railway Company had no reason to suppose that it would not be enforced according to its terms, and a new contract made for the parties, until the decision of the Supreme Court was rendered (R. 127-134). Promptly thereafter, motions for rehearing were filed in accordance with the Texas statutes (R. 143-152, 152-153). Under those statutes, a motion for rehearing is a matter of right. *Article 1762* declares that "a motion for rehearing may be filed with the clerk of the (supreme) court within fifteen days after entry of judgment or decision of the court * * *" (Vernon's Revised Civil Statutes of Texas, 1925). That statute also provides that "the grounds relied upon for the rehearing shall be distinctly specified in the motion". Articles *1763*

and *1764* require service of the motion upon opposing parties, and *Article 1765* states that the Supreme Court may hear and determine the motion at any time after five days from the return of service. The manifest purpose of the statutes is to acquaint the court with its errors and give it an opportunity to correct the same. Accordingly, the motion for rehearing by the Railway Company (R. 143-152), which was adopted by the interveners (R. 152-153), specified the errors committed, including the following:

> "The Court by construction has changed the terms and limited the scope and operation of the contract contrary to established rules of law and constitutional inhibitions" (R. 144).
>
> * * * * * * *
>
> "The decision and judgment of the Court deprives this defendant of its liberty and property without due process of law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States" (R. 144).
>
> * * * * * * *
>
> "As now interpreted and applied by the Court, the lien statutes of Texas impair the obligation of the contract contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States" (R. 144).
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> * * * * * * *
>
> "We shall endeavor to show that the Court has departed from proper and long established principles of law and that under the majority opinion the contract in question is changed and limited by construction, the obligation of the contract is impaired, and this defendant is denied due process of law and equal protection of the law, all in violation of and contrary to the Constitutions of Texas and of the United States" (R. 143).
>
> * * * * * * *

"Furthermore, the Court by its decision and judgment requires this defendant to discharge its contractual obligation by paying 'for the services performed by Locke' * * * and at the same time the Court refuses to compel Locke, or his assignee, to discharge his contractual obligation to furnish the Railway, in advance of payment, written evidence satisfactory to it, that '*all* persons' furnishing labor, materials and supplies have been paid in full. By all of such actions the Court has deprived this defendant of its liberty, property, privileges and immunities, without due course of law and without due process of law, and the Court has denied to this defendant (Railway Company) the equal rights and the equal protection of the law * * * contrary to and in violation of the 5th and 14th Amendments to the Constitution of the United States. And the Court has given an operative effect to the lien statutes of this State which causes them to impair the obligation of the contract * * * contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States" (R. 149-150).

An answer to the motions was filed by the Bank (R. 153-163), and the motions, having been submitted to the Court, were overruled "after due consideration of same" (R. 163).

Questions Presented.

The following questions are presented by this application:

1. Does the arbitrary refusal of the State supreme court to enforce the plain and unambiguous terms of the contract violate the due process clause of the 14th Amendment of the Federal Constitution?

2. Does the arbitrary action of the State supreme court in changing, by unwarranted construction, the plain and unambiguous terms of the contract so that one litigant must

perform its obligation and the other is excused therefrom, violate the equal protection clause of the Federal Constitution?

3. Is it arbitrary action, violative of the due process clause of the 14th Amendment to the Federal Constitution, for a State supreme court to invoke, in aid of its refusal to enforce a plain and unambiguous contract, State statutes which expressly recognize that such contract may be made?

4. Is the obligation of a contract impaired by State statutes in effect when the contract was made, when they subsequently are used by a State supreme court in aid of its refusal to enforce the plain and unambiguous terms of the contract?

5. Is it a violation of the due process clause of the Federal Constitution for the Supreme Court of the State to deprive a party to the contract of the right to fix the time for the payment of an obligation provided in the contract when the Legislature of the State expressly authorizes the very type of provision contained in the contract, the action of the State court at one sweep depriving a party of a right not only expressly given by contract but likewise by statute as well?

Reasons Relied On for Allowance of Writ.

The Supreme Court of Texas has held in substance and effect that:

> There is no violation of the due process clause of the 14th Amendment to the Federal Constitution when it arbitrarily refuses to enforce the plain and unambiguous terms of a contract which is sanctioned by statute and does not violate any law or public policy of the State;
>
> There is no violation of the due process or equal protection clauses of the 14th Amendment to the Federal

Constitution when it arbitrarily changes by construction a plain and unambiguous contract which the parties have made and substitutes therefor new and different contractual provisions under which one party is compelled to perform the obligation previously assumed and the other party is excused therefrom;

It may disregard that portion of a state statute recognizing that a given contract may be made and invoke the balance thereof in aid of its refusal to enforce a plain and unambiguous contract without violating the due process clause of the 14th Amendment to the Constitution; and

It may use state statutes, in effect prior to the execution of a contract, in aid of its refusal to enforce the plain and unambiguous terms of the contract, without causing those statutes to impair the obligation of the contract under Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

Each of these holdings violates the respective provisions of the Federal Constitution, and they either are in conflict with applicable decisions of this Court or present Federal questions of substance not heretofore specifically determined by this Court.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Texas, at Austin, Texas, commanding that court to certify and send to this Court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings in the case on its docket numbered 7580 and entitled "The Citizens National Bank in Abilene *v.* The Texas and Pacific Railway Company, et al.," and that the judgment of the Supreme Court of the State of Texas be reversed by this Honorable Court, and that your petitioner

may have such other and further relief to which it may be entitled; for all of which your petitioner will ever pray.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By WAGSTAFF, HARWELL, DOUTHIT & ALVIS,
Abilene, Texas;
R. S. SHAPARD,
S. W. LANCASTER,
M. E. CLINTON,
Texas and Pacific Bldg.,
Dallas, Texas,
Counsel for Petitioner.

Frank Parrott, M. M. Dawson and K. A. Browning doing business as a co-partnership under the trade name of F. C. Crane Company, and Fort Worth Sand & Gravel Company, a Texas corporation, hereby adopt the foregoing petition for writ of certiorari and urge that it be granted on their behalf as well as for the Railway Company.

GUTHRIE & GUTHRIE,
R. L. GUTHRIE,
Counsel for the Above,
Mentioned Parties,
Petitioners.